

VIRGINIA: IN THE CIRCUIT COURT OF ROCKINGHAM COUNTY

FILED IN THE CLERK'S OFFICE
ROCKINGHAM COUNTY VA

ASHLEY ADAMS,

Plaintiff

[Signature] JAN 19 2021
DEPUTY CLERK

v.

Case No. CL20-4622

ROCKINGHAM COUNTY
Department of Parks and Recreation

Defendant

DEFENDANT'S DEMURRER and SPECIAL PLEA IN BAR

Defendant Rockingham County Department of Parks and Recreation, by counsel, files this demurrrer and special plea in bar in response to the Complaint, and states as follows:

DEMURRER

1. Plaintiff has named Rockingham County Department of Parks and Recreation as the Defendant in this Title VII case. Because Rockingham County Department of Parks and Recreation is *non suis juris* and is not an entity subject to suit, the Complaint should be dismissed against it. *See Booker v. City of Lynchburg*, No. 6:20-cv-00011, 2020 U.S. Dist. LEXIS 128818, at *11 (W.D. Va. July 22, 2020); *Thompson v. City of Danville*, No. 4:10-cv-00012, 2011 U.S. Dist. LEXIS 59698 (W.D. Va. June 3, 2011) *aff'd* 457 Fed. Appx. 221 (departments of locality in Virginia are *non suis juris*, meaning they simply do not have the capacity to be sued"); *Doe v. Commonwealth*, 74 Va. Cir. 75, 83 (Cir. Ct. 2007); *Young v. City of Norfolk*, 62 Va. Cir. 307, 310 (Cir. Ct. 2003).

2. In the alternative, Plaintiff fails to state a claim upon which relief can be granted as she failed to exhaust her administrative remedies with the Equal Employment Opportunity Commission (EEOC), a mandatory predicate to filing a civil action under Title VII.

- a. Such administrative action is initiated by the filing of a charge of discrimination with the EEOC within 300 days after the alleged unlawful employment practice occurred. 42 USCS § 2000e-5(e). A civil action may only be brought by the person aggrieved after the person has received a notice of the right to sue from the EEOC. 42 USCS § 2000e-5(f)(1). The aggrieved person then has 90 days within which to file such civil action. *Id.*
- b. Notably, only those allegations included in the EEOC charge of discrimination will be considered in a subsequent civil action. *Balas v. Huntington Ingalls Indus.*, 711 F.3d 401, 407 (4th Cir. 2013) (details in letters and other documents submitted to the EEOC that were not included in the original charge are barred from consideration).
- c. These administrative procedures are mandatory and must be exhausted before a suit can be filed. *Fort Bend Cty. v. Davis*, 139 S. Ct. 1843, 1851 (2019) (Title VII's EEOC charge-filing provisions are mandatory).
- d. Here, Plaintiff alleged that she exhausted the administrative process in paragraphs 9-12 and in the supporting documents attached to the Complaint as Exhibits A, B, and C. The Charge of Discrimination (Exhibit A to the Complaint) relied upon by Plaintiff to establish that she met the exhaustion requirement is for EEOC Charge No. 438-2017-00066. However, the EEOC Determination and Notice of Right to Sue (Exhibits B and C to the Complaint) relied upon by Plaintiff to establish that she met the exhaustion requirement are for a different EEOC charge: EEOC Charge No. 438-2018-00066, which is not attached to the Complaint or otherwise mentioned.

- e. Because the scope of the Charge of Discrimination is what governs the scope of this suit, Plaintiff must have a right to sue notice for that particular Charge of Discrimination before she can file suit. She is not at liberty to mix and match EEOC charges and right to sue notices.
- f. On the face of the Complaint and its attachments, it does not appear that Plaintiff has received a right to sue notice on EEOC No. 438-2017-00066 which is what governs the scope of this lawsuit, and thus she has failed to exhaust her administrative remedies as mandated by Title VII.

3. Plaintiff fails to state a claim of retaliation (Count III) under Title VII upon which relief can be granted. Plaintiff claims that she was retaliated against in the form a failure to promote. While she asserts that she “repeatedly” reported abusive and illegal conduct, (Complaint 62), the facts allege only one report to HR about Bridges and McQuain’s inappropriate comments about her pregnancy (Complaint 23), and her complaints that McQuain’s cousin, was being promoted, without letting others know of the open position. (Complaint 24). Plaintiff later reported to the county administrator that she was retaliated against for reporting *nepotism* (Complaint 26). However, nepotism is not a practice made unlawful under Title VII. See 42 USCS § 2000e-2. Being retaliated against for reporting nepotism is not a violation Title VII, and such claim should be dismissed.

SPECIAL PLEA IN BAR

4. Counts I and II asserting discrimination and Count III asserting retaliation are time barred.

a. The adverse employment action alleged in these three counts is the alleged failure to promote. Count I alleges that she suffered pregnancy discrimination when she was “denied a fair opportunity for career advancement” (Complaint

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47). Count II alleges that she suffered sex discrimination when other male coworkers were treated better when they were allowed “a fair opportunity to interview and be considered for a career advancement.” (Complaint 54). Count III alleges she was retaliated against when she was denied “the opportunity for career advancement.” (Complaint 63).

- b. A discrete act such as a failure to promote constitutes a separate actionable “unlawful employment practice” triggering the duty to file a charge of discrimination within the prescribed limitations period and is not subject to tolling based upon the continuing violation doctrine. *AMTRAK v. Morgan*, 536 U.S. 101, 114, 122 S. Ct. 2061, 2073 (2002). Title VII’s time limit for filing a charge with the EEOC is one of the mandatory preconditions for relief. *See Fort Bend Cty. v. Davis*, 139 S. Ct. at 1850.
- c. Plaintiff alleges that in late April or early May of 2017, she sought and was denied a promotion to the position of Recreation Programs Supervisor. (Complaint 27 -28).
- d. The position of Recreation Programs Supervisor was filled on May 8, 2017.
- e. Plaintiff had until March 4, 2018, to file a charge of discrimination with the EEOC which was 300 days from May 8, 2017, the date of the alleged “unlawful employment practice.” *See 42 USCS § 2000e-5(e)*.
- f. However, the Charge of Discrimination was not filed until on or after March 12, 2018, which was after the expiration of the deadline. *See Complaint, Exhibit A.*

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g. Because Plaintiff did not file a Charge of Discrimination regarding the alleged failure to promote within 300 days of the date of the unlawful employment practice, all claims of failure to promote are time barred.

WHEREFORE, Defendant respectfully requests that its Demurrer be sustained, that its Special Plea in Bar be sustained, that the Complaint be dismissed with prejudice, and that it be awarded such other and further relief as the nature of the case may require.

ROCKINGHAM COUNTY Department of Parks and Recreation,

By counsel

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed, postage prepaid, on January 19, 2021, to:

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January 19, 2021

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Via Facsimile Only to 540.564.3127

Chaz W. Haywood, Clerk
Rockingham County Circuit Court
80 Court Square
Harrisonburg VA 22801

RE: *Ashley Adams v. Rockingham County, VA*
Case No. CL20-4622

Dear Mr. Haywood:

Please note me as counsel for defendant Rockingham County Department of Parks and Recreation in the above-referenced matter.

Enclosed for filing is Defendant's Demurrer and Special Plea in Bar.

Very truly yours,


Rosalie Pemberton Fessier

RPF:cac
enclosure
cc: Joanne Dekker, Esquire (w/enc.)

TimberlakeSmith
Facsimile Cover Page

To: Rockingham Circuit Court
Attn: Civil filings - Wanda
Fax #: 540.564.3127
From: Rosalie Fessier, Esq.
Subject: Adams v. Rockingham County
CL20-4622
Date: January 19, 2021
Pages 8, including this sheet.

If you do not receive all pages, or have other problems, please call our office at 540.885.1517, and ask for Cheryl.

COMMENTS: Please file the attached Defendant's Demurter and Special Plea in Bar with the other papers in this matter.

Thank you.

From the desk of...

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